



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2005

Ms. Alison Holland
Olson & Olson L.L.P.
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019

OR2005-02045

Dear Ms. Holland:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 219933.

The City of Seabrook (the "city"), which you represent, received a request for information related to the city's building code and a particular property, including several factual questions. You inform us that some information has been or will be released but claim that other information, which you have submitted to this office for our review, is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that the information submitted as Exhibit B was created after the city received this request. Because the city did not maintain these records at the time it received this request, the records are not encompassed by the request, and we do not address them in this ruling. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, *writ diss'd*); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received).¹

Also, we note that the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See Open*

¹Because Exhibit B is not encompassed by the request for information, we need not address your arguments regarding section 552.107 of the Government Code.

Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that receives the request. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume that the city has made the required good-faith effort to relate this request, including the factual questions, to responsive information that is within the city's possession or control.

Next, we must address the city's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You inform us that the city received the request for information on December 16, 2004. However, you did not request a decision from this office until January 3, 2005. You do not inform us that the city was closed for any of the business days between December 16, 2004 and January 3, 2005. We therefore find that the city failed to comply with the procedural requirements of section 552.301 in requesting a ruling from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). You claim that some of the information submitted as Exhibit A is excepted from disclosure under section 552.101 in conjunction with the common-law informer's privilege. The informer's privilege is held by a governmental body and serves to protect its interests in preserving the flow of information to the governmental

body. *See Roviato v. United States*, 353 U.S. 53, 59 (1957). Accordingly, a governmental body is free to waive the informer's privilege and release information for which it otherwise could claim the exception. Open Records Decision No. 549 at 6 (1990). Thus, the informer's privilege does not constitute a compelling reason to overcome the presumption of openness under section 552.302. *See id.* We therefore determine that none of the information at issue may be withheld pursuant to the informer's privilege. Because you claim no other exceptions to disclosure and the information at issue is not otherwise confidential by law, Exhibit A must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 219933

Enc. Submitted documents

c: Ms. Beverly Hammond
4525 Coronado
Seabrook, Texas 77586
(w/o enclosures)